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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 426

SAMUEL STROBL,

Petitioner,

v.

JOHN ZIDEK, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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Petitioner appearing pro se.

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No.

SAMUEL STROBL,

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

PETITION.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Now comes Samuel Strobl, petitioner, appearing *pro se*, and respectfully prays that a writ of certiorari be issued to review the judgment of the Appellate Court for the

First District of Illinois reversing the decree of the Superior Court of Cook County, Illinois, reviving a previous decree of that Court in favor of petitioner and against the respondent in the case entitled *Samuel Strobl* v. *John Zidek, Jr.*, which is reported in 304 Illinois Appellate Court Reports 385. Said judgment was rendered on April 8th, 1940, and a petition by the plaintiff therein, the petitioner herein, to the Supreme Court of Illinois for leave to appeal to that court from said judgment was denied by it on June 17th, 1940, thereby finally exhausting petitioner's remedy in the State courts (R. 158).

The Matter Involved.

The decree of the Superior Court of Cook County, Illinois (R. 65), from which respondent prosecuted his said appeal to the Appellate Court for the First District of Illinois, revived a decree rendered by that Court on January 7th, 1924, which had awarded the petitioner the sum of $12,782.07 as damages for the wrongful destruction of his business by the respondent (R. 10).

On the same day that the original decree was rendered the respondent filed his voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Illinois, Eastern Division, in which he scheduled the petitioner as a creditor (R. 8).

The petitioner filed his claim based upon his said money decree and it was allowed (R. 15). No creditors in that proceeding received any dividends (R. 33). The petitioner filed his objections to the respondent's discharge, stating in the usual form that his claim would be affected by the discharge (R. 16). Prolonged litigation over the discharge ensued, which was finally terminated shortly before the suit to revive the decree was instituted (R. 19).

Respondent at no time procured any injunction against the enforcement of the original decree, and pending the final decision on his objections to the discharge the petitioner took out execution on the decree which was returned *nulla bona* (R. 34).

The money decree was rendered upon petitioner's bill of complaint in which he prayed for the equitable relief of the cancellation of a contract of various judgments procured by respondent against him, of various promissory notes he had given to respondent, for the return to him by respondent of his patent for the manufacture of metallic wheels to which the respondent had procured title and for an accounting (R. 30-31). In addition the bill stated a separate cause of action *in tort* against the respondent for the wrongful destruction by him of petitioner's business of manufacturing said patented wheels and prayed for damages thereby sustained by him (R. 31). The case was heard by a Master in Chancery who found the facts in favor of the petitioner, recommended that the said equitable relief prayed for by the petitioner be granted him, and that in addition he be allowed a money decree for the sum of $12,782.07 as damages for the loss of profits suffered by him in consequence of the said destruction of his business which the Master found was intentionally done by respondent to ruin petitioner (R. 32-100).

The Master found that the entire course of conduct of the respondent showed his determination to ruin the petitioner (R. 92).

The Chancellor of the Superior Court of Cook County, Illinois, affirmed the Master's report, decreed the equi-

table relief prayed for and in addition awarded the petitioner the said money decree for damages (R. 9-10).

Jurisdiction of the Court, 28 U. S. C. A. No. 344 (b) (Jud. Code No. 237 as amended.)

The basis upon which the petitioner contends that this Court has jurisdiction to review the said judgment of the Appellate Court for the First District of Illinois is that that State Court has decided a federal question of substance in a way not in accord with applicable decisions of this Court, in that it has decided that, because the petitioner unsuccessfully opposed the respondent's discharge in bankruptcy, he thereby waived the exemption of his claim under Section 17 of the Bankruptcy Act as one for the malicious and willful injury by the respondent to the petitioner's property (R. 6).

Questions Presented.

The questions presented are:

(a) Whether the exemption of a claim under Section 17 of the Bankruptcy Act is waived by the filing of the claim in the bankruptcy proceeding and having it allowed.

(b) Whether the claimant by opposing the discharge in bankruptcy is estopped to proceed in the State Court and collect his judgment.

(c) Whether, where the issue of the exemption of petitioner's claim was not raised, litigated or determined in the bankruptcy proceeding, would the bankrupt's general discharge be considered as *res judicata.*

Specifications of Errors Relied Upon.

The decision of the Appellate Court for the First District of Illinois is in conflict with the decisions of the Court of Appeals for Illinois and Pennsylvania.

The decision of the Appellate Court is contrary to the decisions of this Court in which cases this Court has laid down the principle of willful and malicious injury to another and of *res judicata*.

The question is one of importance in administering the provisions of the Bankruptcy Act. If the decision of the said Appellate Court is allowed to stand, its effect will be to overrule this and other federal courts and to penalize the innocent and reward the wrongdoer.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

A creditor, whose claim has been scheduled by the bankrupt, has the right, although his claim is exempt from discharge in bankruptcy, to oppose the discharge of the bankrupt.

In re Feuer (C. C. A. 2), 4 Fed. (2d) 892.
Meyer v. *Price,* 250 N. Y. 370; 165 N. E. 814 (reversing 230 N. Y. S. 875; 224 App. Div. 733).
Royal Indemnity Company v. *Cooper* (C. C. A.), 26 Fed. (2d) 585.
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In re Armstrong (D. C. Cal.), 248 Fed. 292.
In re Lewis (D. C. N. Y.), 163 Fed. 137.
Corpus Juris Secundum, pp. 1388-89.
Collier on Bankruptcy (9th ed.), p. 311.
In re Rhutassel, 96 Fed. Rep. 597.
In re Thomas, 92 Fed. Rep. 912.
In re Tinker, 99 Fed. Rep. 79.

II.

It is a settled principle that a creditor whose claim is not dischargeable in bankruptcy may file his claim and accept what dividends are paid without waiving his right of exemption.

In re Lewis Frank & Son, 238 Fed. (C. C. A.) 773.
Friend v. *Talcott,* 228 U. S. 27.
Beyer v. *Sadvoransky, et al.,* 177 N. Y. S. 705.

III.

Where there is no actually contested issue and no order as to jurisdiction in a case, there can be no question of res judicata.

In the instant case no issue was raised, or contested, and there was no order in the bankruptcy proceeding as to whether petitioner's claim was exempt from discharge.

Friend v. *Talcott,* 228 U. S. 27.

Vallely v. *Northern Fire & Marine Insurance Co.,* 254 U. S. 348, 354.

Stoll v. *Gottlieb,* 305 U. S. 165.

IV.

The fact that an action grows out of a breach of contract does not prevent its being maintained in tort.

Cooley on Torts, 103-105, (2nd ed.), note 1.

Addison on Torts, 13.

Rich v. *New York Central & Hudson River Railroad Co.,* 87 N. Y. 383, 398.

Oliver v. *Perkins,* 92 Mich. 304, 310-316.

Orange Bank v. *Brown,* 3 Wendell (Mass.) 161.

Coggs v. *Bernard,* 2 Lord Raym. 909.

Greener v. *Brown,* 323 Ill. 221, 222-223.

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Nevin v. *Pullman,* 106 Ill. 222.

Purington v. *Hinchliff,* 219 Ill. 152.

Kovar v. *Bremer,* 281 Ill. App. 525.

V.

While the action in the instant case was a bill in chancery praying for various forms of equitable relief, such as a rescission of the contract, the return of petitioner's patent, setting aside of judgments, the cancellation of promissory notes and an accounting regarding the advances made by the respondent to the petitioner, it also prayed for damages for the fraudulent and wrongful acts of the respondent, which the Master found and the Court decreed had been done by the respondent with intent to ruin the petitioner.

It has been repeatedly declared by the highest Courts of England and of this country that bankrupt laws are enacted with the object and intention of relieving honest men, but not rascals, from the burden of their debts.

In re Silverman, 22 Fed. Cas. 139.
Congressional Record, June 28, 1898.
In re Dow's Estate, 105 Fed. Rep. 889.
In re Becker, 106 Fed. Rep. 54.
Turner v. *Turner*, 108 Fed. Rep. 785.
Lubke v. *Thomas*, 116 U. S. 606.
In re Scott, 126 Fed. Rep. 981.
McDonald v. *Brown*, 10 Am. Bank Rep. 58.
Dister v. *McCanley*, 71 N. Y. Supp. 949.

VI.

An act lawful in itself becomes unlawful when it is done as one step in a scheme to defraud.

Rich v. *New York Central & Hudson River Railroad Company*, 87 N. Y. 382, 394.
Oliver v. *Perkins*, 92 Mich. 304, 310-316.

VII.

To ascertain whether the petitioner's claim was of such a character as to be exempt from a discharge in bankruptcy, the Court may examine the entire record to determine that fact.

Bank of Williamsville v. *Amherst Motor Sales, Inc., et al.*, 254 New York Supplemental (Appellate Div.) 825.

Loveland on Bankruptcy, Sec. 763.

In re Bernard, 278 Fed. 734.

Humphrey v. *Heller*, 283 N. Y. S. 915.

8 Corpus Juris Secundum, p. 1545, Sec. 579.

In re Petition of Chalukonis v. *Josziviak*, 287 Ill. App. 170, 172-173.

In re Petition of Blackledge, 359 Ill. 482.

Blattan v. *Evans, et al.*, 57 Ill. App. 311.

Kavanaugh v. *McIntyre*, 112 N. Y. S. 987, 128 App. Div. 722.

In re Greene (C. C. A. Ill.), 87 Fed. (2d) 951.

In re Davis (D. C. Tex.), 34 Fed. (2d) 778-780.

In re Armstrong (D. C. Cal.), 248 Fed. 292.

7 Corpus Juris 370, note 82.

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In re Fuller (D. C. Pa.), 18 Fed. Supp. 394.

In re Pulver, 146 Wash. 597, 11 Am. B. (U. S.) 512.

Ginsberg v. *International Shoe Co.* (Tex. Civ. App.), 299 S. W. 695.

VIII.

In his bill in chancery, the petitioner was not required to and did not elect between his remedies. He pursued all his remedies in his bill, not only those of an equitable character but his action in tort for the willful and malicious destruction of his business. He had a right so to pursue all his remedies. It is no answer to say that that cause of action grew out of a breach of contract.

Rich v. *New York Central & Hudson River Railroad Company*, 87 N. Y. 382.
Oliver v. *Perkins*, 92 Mich. 304, 310-316.
Greener, et al. v. *Brown*, 323 Ill. 221, 222-223.
Church v. *Anti-Kalsomine Co.*, 118 Mich. 219.

IX.

It makes no difference that some of the acts done in the accomplishment of an unlawful purpose are in themselves lawful. No person can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any loss willfully caused by such interference will give the party injured a right of action for all damages sustained.

Carlson v. *Carpenter Contractor's Association*, 224 Ill. App. 430 (aff'd 305 Ill. 331).
Purington v. *Hinchliff*, 219 Ill. 152.
Kovar v. *Bremer*, 281 Ill. App. 525.
White v. *White*, 132 Wis. 121, 111 N. W. 1116.
Hilliard on Torts, Vol. 1, 3d ed., p. 460.

In petitioner's bill, in which the said money decree was rendered, he prayed, in addition to the equitable relief asked for, that the defendant be (R. 59):

"Ordered and Decreed to Pay to Your Orator any and all other Losses which he may have Suffered by reason of the *Wronguful* acts of the defendant, Includ-

ing the Loss of his business and of the profits which he otherwise would have made, but for the said *Wrongful* acts of the defendant."

It is not material that the allegations of petitioner's bill of the fraudulent design and acts are coupled with the statement, that these acts were done in defiance of the contract, or that the words willful and malicious are not used. The controlling circumstance is that they constituted a breach born of that wider range of legal duty, which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud.

Humphrey, et al. v. *Heller, et al.*, 283 N. Y. S. 915.
Tinker v. *Calwell*, 193 U. S. 473.
Kerwhacker v. *C. C. & C. R. R. Co.*, 3 Ohio St. 188.
In re Stenger, 283 Fed. 459.
In re Dutkiewicz, 27 Fed. (2d) 334.
In re Greene, 87 Fed. (2d) 951 (C. C. A. 7).
In re Wegner, 88 Fed. (2d) 899 (C. C. A. 7).

IN CONCLUSION.

For the reasons above mentioned the petitioner respectfully submits that his petition for a Writ of Certiorari should be granted. His grounds therefor are more fully developed in the attached brief in support of his petition.

Respectfully submitted,

SAMUEL STROBL,
2652 West Lake Street,
Chicago, Illinois,
Petitioner appearing pro se.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The decision of the Appellate Court in this case conflicts with the great weight of authority in a question of Bankrupt Law.

The Appellate Court in its opinion (R. 154) has held that the claim would be released if the bankrupt were discharged. That question was litigated and relitigated a number of times in the Federal Court as shown by the opinion of Judge Wilkerson.

After reading the memorandum of Judge Wilkerson, the petitioner failed to find any docket entry, nor order about his claim being adjudicated a number of times, nor relitigated. But did find in said memorandum, that Strobl filed a petition to vacate the order of discharge, and that the same was denied.

The petitioner sought to revoke the order of discharge on the ground that he scheduled the petitioner's letters patent of the United States No. 465,492, as his own property, and by a stipulation admitted his failure to schedule his interest in his business.

That the District Court of the United States exceeded its jurisdiction in discharging this respondent, because his bankruptcy record discloses these amazing violations of the Bankruptcy Act:

In re Stoll v. *Gottlieb,* 305 U. S. 165.

1. Failed to list any *bona fide* creditors other Samuel Strobl.

2. He failed to turn over any assets to the trustee.

3. There was no meeting of creditors.

4. Failed to comply with lawful order of Referee Wean to produce all his books from which his true financial condition might be ascertained, by definitely saying: "Not without a Court order."

5. Upon being asked:

> "Do I understand you to say, that you will not produce before the Referee here, voluntarily, the original certificate of incorporation of the City Wire Frame Co., a corporation?"

John Zidek, Jr. replied:

> "No, I wouldn't.
> Q. You will not?
> A. No."

John Zidek, Jr., then denied that he had any interest at any time in the co-partnership business, the City Wire Frame Co., and the Referee then made the following caustic remark (p. 14): "How are you going to tell from this which time he is lying under oath?"

In respondent's bankruptcy record the following appears (Tr. No. 2, p. 62).

> "It is stipulated and agreed by and between counsel for the objecting creditor (the petitioner here) and counsel for the bankrupt (but not the present counsel) that the schedules of the bankrupt's assets filed in this proceeding, do not show any interest of the bankrupt in a business known as the City Wire Frame Co., unincorporated, or in any co-partnership business of that name; and shows with respect to a corporation called the City Wire Frame Co., incorporated, that the bankrupt has, and has scheduled ten shares

of the capital stock of that corporation, at no par value, and which he values in the schedules at fifty dollars; and that the bankrupt has not scheduled in his list of debtors, F. F. Hodges, or any person of that or similar or like name as one of his debtors."

The photostatic copy of the Articles of Incorporation shows that the respondent turned over the partnership assets of $33,000.00 to the corporation of the same name, *without receiving anything from the corporation for his transfer.* He testified that he bought his share in the corporation. No cash transaction. He worked for the corporation for a week.

Transfer without consideration is void.

Counsel for the petitioner then asked the respondent.

"Is that the time you worked for the corporation when you were on your vacation?
A. No, some other time.
Q. How much do you earn a week?
A. Fifty dollars."

Respondent testified that F. F. Hodges owed him $6,000.00, and by stipulation admitted in open court his failure to schedule him as his debtor.

The above clearly shows that the respondent's bankruptcy proceeding was grotesque and farcical, and it was a bankruptcy in name only, but not in substance, and it was in line with his determination to ruin the petitioner in depriving him of his business and of letters patent of the United States.

The forces of ruination must have been strong that induced the otherwise able and learned counsel for the petitioner to prepare the trial court decree not in conformity with the findings of the Special Master.

At the final hearing before Judge Charles A. Williams, who revived the money decree with interest and costs, the following occurred:

"Counsel for respondent: We appeal, your Honor.
The Judge: Then you must put up a bond.
Counsel for petitioner: I don't want no bond.
The Judge: And you agree to that?
Counsel for petitioner: I don't want no bond.
The Judge: I will make him put up a bond of $250.00 for costs."

Later, petitioner's counsel made a motion to the Appellate Court to increase the bond, which was denied.

This case presents the familiar example of the inventor, and the financially strong exploiter, who, under the guise of a contract, designs to rob the inventor of the fruits of his genius.

At the last hearing before Judge Wilkerson the following occurred: Counsel for petitioner made a motion asking the Court to review the whole record. Counsel for respondent (but not the present counsel) objected. Counsel for petitioner stood there without saying a word. In desperation, petitioner whispered to his counsel:

"Show the Judge the stipulation.
Judge Wilkerson: Let me see it."

After the reading, the Judge addressed himself to counsel for respondent, saying:

"This Court does not want to hear from you any more.
Counsel: What shall I do, your Honor?
The Court: You don't do nothing until you hear from this Court."

Then Judge Wilkerson asked the petitioner:

> "How many lawyers did you have in this case?
> A. Eighteen, your Honor.
> Counsel for respondent: He had twenty lawyers."

Petitioner had to correct himself by saying: "I had twenty lawyers, your Honor."

Here is an important revelation: Counsel for respondent knew better than the petitioner. He apparently paid off that many; and this constituted the review of the whole record.

The memorandum written by Judge Wilkerson failed to cite the above mentioned stipulation, and in spite of it held (R. 152): "The order of Judge Carpenter was correct."

The Special Master in his report (R. 90), had this to say:

> "Throughout the testimony of Strobl has been clear and convincing. He has aparently told the truth even when it seemed to his disadvantage. The testimony of the two lawyers (Paulus F. B. Koenig and John P. Barnes) was not as satisfactory. Apparently they did not have a present recollection of very much that occurred, but testified as best as they could from past recollection.
>
> The defendant (respondent here) Zidek was not at all times as frank and open as Strobl."

Here is the Master's masterly exposition of the character of the two litigants before this Court. On the one hand, the petitioner always told the truth even when it seemed to his detriment, on the other, the respondent always gave evasive answers. Two hundred eighteen times he testified: " don't know, I don't remember," and Referee Wean called him a liar.

Petitioner feels aggrieved that, being honest and free from any wrongdoings, he should be singled out to be deprived of his business, of his letters patent of the United States and on top of this of his money decree upwards of $24,000.00.

We merely desire here to call attention briefly to some of the decisions cited in the petition.

I.

As to the right of the petitioner to have opposed the respondent's discharge in bankruptcy without thereby being precluded from claiming that his claim was exempted from discharge.

In the case of *In re Feuer* (C. C. A. 2), 4 Fed. (2d) 892, cited in the petition, the Court considered the point involved in the instant case, and decided (Opinion, p. 893) that *any creditor is a party in interest;* that a creditor whose debt is not dischargeable, although he has nothing to fear from a discharge, provided he can make good the exclusion of his debt under *Section* 17 *of the Act,* may have an interest to avoid that issue, if he can, and *ab initio* deprive the bankrupt of his plea in bar to any subsequent action; *and that any other rule would be quite contrary to the natural purpose of the Act.* The Court concludes its opinion with the following statement (Opinion, p. 893):

> *"In short, there is no good reason for saying that he may not have two strings to his bow."*

II.

The question of the dischargeability of plaintiff's claim was not raised, litigated or decided in the bankruptcy proceeding and nothing decided there is res judicata of his claim that it was not dischargeable.

In *Vallely* v. *Northern Fire & M. Ins. Co.*, 254 U. S. 348, 354, it was held (Opinion, p. 354) that where there is no contested issue and order, no decision in the case can be held as *res judicata* on such an issue not raised, contested or decided. That is the case here. No issue was raised and no order was made in the bankruptcy proceedings on the question of the petitioner's claim being exempted from discharge under Section 17 of the Bankruptcy Act. The decision of the Appellate Court of Illinois (R. 150) that the question of the petitioner's claim being exempt was passed upon in the bankruptcy proceeding and under the authority of *Stoll* v. *Gottlieb*, 305 U. S. 165, became *res judicata* is untenable. In that case there was such an actually contested issue and an order thereon, whereas in the case here no such issue was raised, contested or adjudicated. The gist of the Court's opinion in that case was addressed to those Courts who are wont to exceed their jurisdiction. The Court in that case held:

> "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of authority granted to it by its creators."

The learned Judge in that case made a very important statement of the law pertaining to the bankruptcy, by holding that:

> "If No. 77-B were construed to empower the District Court to cancel the guaranty, it would violate the Fifth Amendment."

A fortiori, and in passing, may we not say with equal force that, if the District Court had the power to rule to deprive the petitioner of his money decree, and give it to the respondent, that likewise would violate the Fifth Amendment.

It was idle, therefore, for the Appellate Court to hold that the petitioner's statement in his objections to the discharge that his claim would be affected by the discharge amounted to an admission that the claim would be released, if the bankrupt were discharged. Federal cases to the contrary are cited under Point II of the Petition herewith.

III.

As to the question whether a creditor, whose claim is dischargeable in bankruptcy, may file his claim, accept what dividends are paid, without waiving his right of exemption.

In the case of *In re Lewis Frank & Son,* 238 Fed. (C. C. A.), the Court held (p. 774), that the creditor might proceed with his suit in the State Court *in tort,* notwithstanding that he had first proved his claim in bankruptcy on contract. The Court there cited *Friend* v. *Talcott,* 228 U. S. 27, in support of its decision. In the last mentioned case the claimant had filed his claim, had accepted a dividend under a composition and had then brought a suit to recover against the bankrupt after his discharge, on the ground that the claim was exempted from discharge under Section 17. The Court there said that the creditor would not be held to have elected his remedy by filing and proving his claim in the bankruptcy proceeding and accepting the dividend; and that he had not thereby *waived* his right to proceed to collect the balance of the debt due him from the bankrupt, saying (p. 38):

> "It is apparent that the exemptions do not rest upon any theory of the *exclusion* of the creditor from the bankrupt act or of deprivation of right to participate in the distribution, but solely on the ground that, although such rights are enjoyed, an exemption from the effect of the discharge is *superadded.* The text leaves no room for any other view, since the exceptions in terms are accorded to certain classes of debts which are provable under *Section* 63, and therefore debts which are entitled to participate in the distribution, the language being: 'A discharge in bankruptcy shall release a bankrupt from all of his *provable* debts, except such as,' etc."

IV.

A breach of contract may give rise to an action in tort, because of a breach of a duty arising out of the contract.

The fact that a cause of action grows out of a breach of contract does not prevent its being maintained *in tort.* That rule is laid down, after an exhaustive discussion of the subject, in the leading case of *Rich* v. *New York Central and Hudson River Railroad Company,* 87 N. Y. 383, 398. The gist of that decision is that, where the omission to perform a contract is also the omission of a legal duty growing out of contract, an action lies for a breach of such duty; that such an action is (Opinion, p. 398):

> "born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud."

That exactly states the principle applicable to the instant case as found by the Master and decreed by the Court, namely that the respondent *ab initio* set out to ruin the petitioner, and, although some of his acts were legal

in themselves, they were all unlawful and invasion of the petitioner's right of property because of the evil design.

The cases of *Oliver* v. *Perkins*, 92 Mich. 304, 310-316, and *Church* v. *Anti-Kalsomine Company*, 118 Mich. 219, follow the rule laid down in the above case and apply the principle under facts closely parallel to the instant case.

V.

The wrongful and fraudulent acts of the respondent whereby he destroyed the petitioner's business, while they grew out of a breach of the contract between them, were nevertheless a breach of the above mentioned legal duty.

This breach is alleged in support of the separate cause of action set forth in petitioner's bill of complaint in apt language to state a cause of action *in tort*, and the bill prays in apt language for the damages thereby sustained by the petititoner (R. 59). The Master found these allegations to have been proven and the Court adopted the Master's findings in entering the money decree for the damages (R. 9-10, 32).

The Appellate Court for the First District of Illinois in its opinion (R. 150) has entirely ignored these facts and the numerous decisions cited under Point IV of the petition herewith, and has merely contented itself with the *ipse dixit* that the money decree for the damages was awarded merely as damages for a breach of the contract.

VI.

While some of the acts of the respondent were lawful in themselves as mere breaches of contract, they were accompanied by unlawful acts and all were directed to the accomplishment of an unlawful design.

Conduct substantially identical as that in the instant case was held in *Carlson* v. *Carpenter Contractors' Union*, 224 Ill. App. 430 (aff'd. 305 Ill. 331), to give rise to an action for willful and malicious injury to the business of another. It was there held that the true test of liability was the primary or ultimate purpose of the defendant, and that the fact that some of the acts done in the accomplishment of such a wrongful purpose were in themselves lawful would not permit the wrongdoer to escape liability; that such acts, even if in themselves lawful, were unlawful if done for an unlawful purpose.

To the same effect see *Meadowmoor Dairies Inc.* v. *The Milk Wagon Drivers Union of Chicago*, 371 Ill. 377, 382.

The Appellate Court for the First District of Illinois has in its opinion ignored the settled rule of law that in such case all of the acts are unlawful.

VII.

The character of the petitioner's claim may be determined by an examination of the entire record.

We refer the Court to the authorities to that effect cited under Point VII of the petition herewith. The Chancellor in reviving the decree with a malice count based it upon such an examination which, as has been shown, discloses that the money decree was based upon a cause of action which exempted it from discharge under Section 17 of the Bankruptcy Act. The Appellate Court for the First District of Illinois has in its opinion ignored this fact.

VIII.

It was not necessary to use the words malicious and willful in stating the separate action in tort against respondent. It is implicit in the allegations and the findings of the Master that the respondent's acts were malicious and willful.

In *Humphreys, et al.* v. *Heller, et al.*, 283 N. Y. S. 915, the Court held that a judgment rendered against the bankrupt in an action for injuries caused by a vicious dog kept by the defendant in that action, who had knowledge of the ferocious character of the dog, was not dischargeable in his bankruptcy proceeding, because the action came within the meaning of the words malicious and willful injury as used in Section 17 of the Act. The Court said (Opinion, p. 916) that the form of the action was not conclusive; that resort may be had to the entire record to determine the essential character of the act; that the willful and malicious character of the act is implicit in such an action; and that it is immaterial that the complaint does not allege that it was willful and malicious. *A fortiori* that is the case here where the Master found that the respondent *ab initio* set out to ruin petitioner, by boasting of his determination to ruin the petitioner (R. 33).

The Court said *In re Dutkiewicz*, 27 Fed. (2d) 344, that it is sufficient to constitute willful and malicious injury to property done without just cause or excuse.

To the effect is *In re Greene*, 87 Fed. (2d) 951 (C. C. A. 7), where the Court said that the action does not involve actual malice. In announcing the same rule *In re Wegner*, 88 Fed. (2d) 899 (C. C. A. 7), the Court said that the cause of action need not be stated in the language of the exception; that it need only be charged in language which

clearly shows intent on the part of the bankrupt to injure others; and that (p. 953) the verdict of the jury is determinative. So here is the finding of the Master.

Respondent, after disobeying the lawful order of the Referee, and by stipulation, admitted his failure to schedule his assets, and thus violated the most important provision of the Bankruptcy Act, cannot expect a court of justice to aid him in the accomplishment of his fraudulent purpose.

IN CONCLUSION.

The decision of the Appellate Court for the First District of Illinois is so contrary to the applicable decisions of this Court as to deserve its consideration and this Court should not be deterred from considering that question, because the Appellate Court, without any foundation in the record therefor and in direct opposition to the evidence, the findings of the Master and the original decree of the trial Court, and the decree of revivor with a malice count, has found that the petitioner's said money decree was awarded merely as damages for breach of contract (R. 150).

The Federal question is of such importance that this Court should pass upon it and not leave the decision of the Appellate Court of Illinois to stand unchallenged as a final interpretation of it.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Appellate Court for

the First District of Illinois, and that said judgment of the said Appellate Court may be reversed by this Honorable Court, in order that justice may be done to the petitioner, and that your petitioner may have such other relief in the premises as to this Honorable Court may seem meet and just.

SAMUEL STROBL,
2652 W. Lake Street,
Chicago, Illinois,
Petitioner appearing pro se.

SEP 30 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 426

SAMUEL STROBL,

Petitioner,

vs.

JOHN ZIDEK, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

JOHN ZIDEK, JR.,
Respondent pro se.

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OPINION BELOW.

The opinion of the Appellate Court appears in 304 Ill. App. 385, and on pages 150-155 inclusive of the record herein.

JURISDICTION.

The judgment sought to be reviewed was entered by said Appellate Court on April 8, 1940, reversing the decree of the trial Court (R. 149). On June 21, 1940, there was filed in said Appellate Court a certified copy of an order of the Supreme Court of Illinois entered on June 17, 1940, in case No. 25747, entitled *Samuel Strobl, Petitioner,* v. *John Zidek, Jr., Respondent,* denying petitioner's petition for leave to appeal (R. 156, 157).

STATEMENT OF THE CASE.

The original decree, entered on January 7, 1924, awarded petitioner damages in the sum of $12,782.07 (R. 13), but not "for the wrongful destruction of his business by the respondent," as set forth by petitioner under the caption "The Matter Involved." Instead, said award of damages was for: (1) the balance found to be due for wheels manufactured during the first year of a five-year contract between the parties (R. 94, 95, Pars. 28, 29, 30); and (2) loss of profits during the remaining four years of the contract period (R. 98, Par. 35).

In 1919, the parties entered into a contract whereby Zidek agreed to advance funds, and Strobl to manufacture metallic wheels exclusively for Zidek (R. 22-28, and Master's report, R. 81, Par. 4). Unfortunately, because of an oversight the copy of the contract held by Strobl was incomplete, in that the figure "30" limiting the overhead in the cost of production, had been omitted from a blank space (R. 90, 26, 82). Each party stood on the copy of the contract respectively held by him, and a dispute arose over the price that Zidek was to pay for the wheels. At the close of the first year, the parties had a conference with respect to differences that had arisen, and the Master finds that:

> "Mr. Zidek became *convinced* that he was not then indebted to Mr. Strobl. He stated his *convictions* and left the conference" (R. 83, Par. 9). (Italics ours.)

He, thereafter, wrote a letter (Defendant's Ex. 5, R. 83), to Strobl in which he stated that 13¢ per wheel had been agreed upon, and he refused to pay more or to advance

further funds. Respondent "treated the letter as such repudiation as put an end to the contract * * * and sued for the profits he would have realized if he had not been prevented from performing his contract and also for the losses he had sustained" (Master's report, pp. 88, 89, Par. 14).

The history of the litigation in the bankruptcy court over a period of thirteen years is substantially correct as set forth on page 2 of said petition. This terminated with Judge Wilkerson's "Memorandum" opinion entered on December 2, 1937 (R. 19-21).

While it may be somewhat doubtful as to whether the complaint stated a cause of action *in tort*, an examination of the Master's report shows clearly that respondent was not in any sense liable in tort. On this issue the Master found against Strobl, and declined to recommend in his report that Zidek redeliver machinery purchased by him at the sheriff's sale of Strobl's property (R. 99, 100, Par. 38); and refused to make a finding on the charge in the complaint that Zidek had copied Strobl's dies and machinery (R. 93, Par. 24).

Contrary to petitioner's statement, the Master at no place found that the respondent intentionally destroyed petitioner's business; at no place found that the entire conduct of respondent showed his determination to ruin Strobl. The reference to the record (p. 92) contained on page 3 of the petition, is confined to the two lawsuits filed by Zidek against Strobl, on the same day that Strobl sued Zidek. (This is more fully discussed under Point II, p. 10 this brief.)

SUMMARY OF ARGUMENT.

I.

THE APPELLATE COURT PROPERLY DECIDED THE FEDERAL QUESTION, THAT THE DECREE ENTERED ON JANUARY 7, 1924, AWARDED NO DAMAGES FOR WILFUL AND MALICIOUS INJURIES TO PETITIONER'S PROPERTY, BUT ONLY FOR THOSE DAMAGES RESULTING FROM A BREACH OF CONTRACT, AND THAT THE DECREE WAS DISCHARGED IN BANKRUPTCY.

Section 17 of the Bankruptcy Act reads in part:

> "A discharge in bankruptcy shall release a bankrupt of all his provable debts, except such as * * * (2) are liabilities * * * for wilful and malicious injuries to the * * * property of another," etc.

Section 63a of the Bankruptcy Act, defining "provable debts," reads in part:

> "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment * * * (4) founded upon an open account, or upon a contract express or implied."

Crawford v. *Burke*, 195 U. S. 176, 193;

Davis v. *Aetna Acceptance Co.*, 293 U. S. 328, 332, 333;

Kreitlein v. *Ferger*, 238 U. S. 21, 27;

Tindle v. *Birkett*, 205 U. S. 183, 186.

II.

THE FINDING OF THE MASTER THAT ZIDEK'S SUING STROBL AND LEVYING ON HIS MACHINERY PROVED HIS DETERMINATION TO RUIN STROBL, DOES NOT RENDER THE DECREE ONE FOR MALICIOUS INJURIES TO STROBL'S PROPERTY.

(a) The Master also found that Zidek "was clearly within his rights in filing the suits" (R. 92). He was, therefore, not guilty of malice in prosecuting them.

38 Corpus Juris, pp. 398,401;

Leyenberger v. *Paul,* 12 Ill. App. 635, 637;

Tumalty v. *Parker,* 100 Ill. App. 382, 388.

(b) The Master found against petitioner on allegations in his complaint charging tortious conduct. (R. 92, 93, Par. 24; R. 99, 100, Par. 39.)

III.

PETITIONER'S ARGUMENT IS UNCONVINCING, THAT THE BREACH OF CONTRACT BY ZIDEK GAVE RISE TO AN ACTION IN TORT, AND THAT, ALTHOUGH THE COMPLAINT DOES NOT CONTAIN THE WORD "MALICIOUS," THE RESULT WAS, NEVERTHELESS, A MALICIOUS TORT, AND THAT THE DECREE WAS NOT DISCHARGED IN BANKRUPTCY.

The issue is *not what the cause of action may have been,* but rather what is the character of the *Master's report,* and the *decree* which approve it, and which petitioner has sought to revive.

Sections 17 and 63a of the Bankruptcy Act.

IV.

JURISDICTION WAS NOT CONFERRED ON THIS COURT BY THE APPELLATE COURT'S ADDITIONAL, BUT WHOLLY UNNECESSARY REASON FOR REVERSING THE TRIAL COURT'S DECREE OF REVIVOR, NAMELY, THAT PETITIONER'S PLEADING IN 1924, IN HIS OBJECTIONS TO THE RESPONDENT'S DISCHARGE IN BANKRUPTCY, THAT HIS CLAIM WOULD BE "AFFECTED BY THE DISCHARGE OF SAID BANKRUPT," AND HIS LITIGATION ON THAT THEORY FOR THIRTEEN YEARS IN THE BANKRUPTCY COURT RESULTED IN AN ADJUDICATION THAT HIS MONEY DECREE WAS DISCHARGEABLE.

To confer jurisdiction on this Court to entertain a petition for writ of certiorari the federal question alleged to have been improperly decided in the State Court must have been necessary to the determination of the cause.

28 U. S. C. A. Sec. 344;

Harrison v. *Morton,* 171 U. S. 38, 47;

Cook County v. *Calumet & Chicago Canal & Dock Co.,* 138 U. S. 635, 651;

De Saussure v. *Gaillard,* 127 U. S. 216, 234;

Murdock v. *Mayor, etc of Memphis,* 87 U. S. 590, 636, 22 L. Ed. 429, 444.

V.

ON PAGES 12-16 OF HIS BRIEF, PETITIONER HAS MADE ALLEGATIONS AND CHARGES, TOO SERIOUS TO BE IGNORED, BUT WHICH ARE NOT WITHIN THE SCOPE OF HIS PETITION, ARE NOT SUPPORTED BY ANYTHING IN THE RECORD, AND THE SAME SHOULD BE DISREGARDED BY THIS COURT.

Gunning v. *Cooley*, 281 U. S. 90, 98;

Webster Electric Co. v. *Splitdorf Electrical Co.*, 264 U. S. 463, 464;

Alice State Bank v. *Houston Pasture Co.*, 247 U. S. 240, 242;

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Johnson v. *Manhattan Ry. Co.*, 289 U. S. 479, 494;

Zellerbrach Paper Co. v. *Helvering*, 293 U. S. 172, 182.

ARGUMENT.

I.

(REPLY TO POINTS "VI" & "VII" PETITIONER'S BRIEF.)

The Appellate Court properly decided the Federal Question, that the decree entered on January 7, 1924, awarded no damages for wilful and malicious injuries to petitioner's property, but only for those damages resulting from a breach of contract, and that the decree was discharged in bankruptcy.

The question decided by the Appellate Court was one of fact, determined from the character of the Master's report, and of the decree which approved it (R. 75-102, R. 9-14).

The applicable portions of the Bankruptcy Act, Sections 17 and 63a, are set out under Point I (p. 4 of this brief).

Under Section 63a, the original money decree was, in form "a fixed liability," and was *provable*. The remaining question, and the only issue in the case, is whether the decree purports to award damages "for wilful and malicious injuries" to plaintiff's property. The Appellate Court held that the decree awarded no such damages, and that it was accordingly discharged by Zidek's bankruptcy.

Since it becomes important to note the exact ground on which the Appellate Court placed its decision, we quote its holding in the following language:

> "We do not stop to decide this question (whether in a suit for revivor, the evidence taken before the Master in the original suit is competent) for the reason that we are of opinion that in either view, plaintiff cannot

recover. *A consideration of the record discloses plaintiff's suit was based on his contention that defendant had breached the written contract entered into between them, and the report of the Master and the decree are to the same effect. The method of accounting by the Master, approved by the decree, awards plaintiff the amount due him under the accounting, and for damages he sustained by reason of the breach. No vindictive or punitive damages are allowed.* The record discloses that on the day plaintiff filed his suit for an accounting, defendant Zidek brought two suits against plaintiff on notes executed by plaintiff to evidence moneys advanced by defendant to him under the contract, and after the judgments were entered in these two cases, Zidek caused a levy to be made on some of plaintiff's property and it was sold. The Master, in passing on this question said: 'Whatever may be argued against the wisdom of the conduct of Zidek in bringing this series of suits from a business standpoint or one of morals I find that the defendant herein, John Zidek, Jr., was clearly within his legal rights in filing the suits in question and that they were not prematurely brought. The course of conduct of Zidek shown by the several suits at law proves, however, beyond doubt the repudiation by Zidek of the contract between Strobl and Zidek as set forth in Paragraph 4 of this report and his determination to ruin Strobl.'

• • •

"A number of other matters are pointed out by counsel for plaintiff as indicating that defendant's action was malicious, but we think it would serve no purpose to discuss these matters in detail because we are of opinion that his contention was not sustained by the Master or by the Chancellor.

"Upon a consideration of the whole record, we think plaintiff has failed to show that the action of defendant

was of such a character as would prevent his claim from being discharged in bankruptcy'' (R. 152, 153, 154). (Italics ours.)

The foregoing excerpt from the Appellate Court's opinion states the real ground for its reversal of the decree of revivor, is strictly in accordance with the portions of Sections 17 and 63a of the Bankruptcy Act quoted under Point I (p. 4 this brief) and with the applicable decisions of this and the various Circuit Courts of Appeal. Being a decree for a definite sum, it was provable, and since it was not an award for vindictive damages, or for malicious injuries, it was discharged in bankruptcy. (*Crawford* v. *Burke,* 195 U. S. 176, 193, and other authorities cited under Point I, p. 4 this brief). The only federal question necessarily involved was, therefore, properly decided by the Appellate Court.

II.

(REPLY TO POINTS "IV" & "V," PAGE 21, PETITIONER'S BRIEF.)

The finding of the Master that Zidek's suing Strobl and levying on his machinery proved his determination to ruin Strobl, does not render the decree one for malicious injuries to Strobl's property.

The foregoing finding of the Master appears at the close of the first paragraph of the foregoing excerpt from the Appellate Court's opinion. It is to be noticed that the Master also found that Zidek "was clearly within his legal rights in filing the suits in question" (R. 92, 153). He, therefore, had *not only probable cause, but also a good and meritorious cause of action.* He could not, under those circumstances, be found to be guilty of prosecuting them maliciously. (See 38 Corpus Juris, 398, 401, and other authorities cited under Point II (a) of this brief.)

Moreover, the Master found against petitioner on allegations in his complaint which might be considered as charging tortious conduct (R. 92, 93, Par. 24; R. 99, 100, Par. 39). Nor can it be overlooked that the Appellate Court found that "No vindictive or punitive damages were allowed," and that the award was merely for damages resulting from a breach of contract (R. 153).

III.

(REPLY TO POINT "VIII," PAGE 23, PETITIONER'S BRIEF.)

Petitioner's final argument is unconvincing, that the breach of contract by Zidek gave rise to an action in tort, and that, although the complaint does not contain the word "malicious," the result was, nevertheless, a malicious tort, and that the decree was not discharged in bankruptcy.

The issue is not whether there was a *cause of action* for a malicious tort, but what did the Master find in his *report*, and what was the Court's *decree*. The Master found that Zidek acted without malice, and that Strobl had been damaged by Zidek's breach of the contract. He reports that, *"The complainant's solicitor argues • • • that the measure of damage is definitely fixed by the contract"* (R. 98, Par. 35). The Master adopted petitioner's view at the trial and awarded damages to compensate him for his loss under the contract only. Moreover, as we have above pointed out, the Master refused to find for petitioner on charges of tortious conduct (R. 93, Par. 24; R. 99, Par. 39).

IV.

(REPLY TO POINTS "I," "II," "III," PETITIONER'S BRIEF.)

Jurisdiction was not conferred on this Court by the Appellate Court's additional, but wholly unnecessary, reason for reversing the trial Court's decree of revivor, i.e., that petitioner's pleading in 1924, in his objections to the respondent's discharge in bankruptcy, that his claim would be "affected by the discharge of said bankrupt," and his litigation on that theory for thirteen years in the bankruptcy court, resulted in an adjudication that his money decree was dischargeable.

The holding of the Appellate Court set out in the foregoing excerpt of its opinion (p. 8 this brief) is decisive. Anything beyond the finding and holding that the money decree awarded damages merely for breach of contract, and not for malicious injuries was mere surplusage. The language of the portion of the opinion especially relied on by petitioner shows clearly that it was just an additional reason, supplementing the real ground for reversal. It reads:

> "There is *another reason* why the decree cannot stand. Plaintiff, in his verified objections to defendant's discharge in the bankruptcy court, after setting up that his claim had been filed and allowed in the bankruptcy proceeding, said that his claim would be 'affected by the discharge of said bankrupt'—*i.e.,* that the claim would be released if the bankrupt were discharged. The question was litigated and relitigated a number of times in the Federal Court, as shown by the opinion of Judge Wilkerson and adjudicated against Strobl. Therefore, the same question cannot be relitigated as was sought to be done in the instant case" (Rec. 154). (Italics ours.)

Since this portion of the opinion was wholly unnecessary to a determination of the cause, it cannot confer jurisdiction on this Court to entertain a review by writ of certiorari. Section 344 of Title 28 U. S. C. A. confers on this Court jurisdiction by writ of certiorari "with like effect as if brought up by writ of error." The firmly established rule that the federal question alleged to have been improperly decided must have been necessary to the determination of the case was announced by this Court in *Harrison* v. *Morton*, 171 U. S. 38, 47, in the following language:

> "It is settled law that, to give this Court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, *but that its decision was necessary to the determination of the cause*, and that it was actually decided adversely to the party claiming a right under the Federal laws or constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock* v. *Memphis*, 20 Wall. 590; *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635." (Italics ours.)

Additional authorities to the same effect are cited under Point IV (p. 6 of this brief).

Petitioner's contentions under Point II (p. 6 of his petition) that "a creditor whose claim is not dischargeable in bankruptcy may file his claim and accept dividends without waiving his right of exemption" from Section 17 of the Act, is beside the point. The question presented by the facts in the case at bar is whether a claimant may tender an issue in objections filed to the bankrupt's discharge that his claim is dischargeable, and upon that theory, litigate for thirteen years, and upon the determination of that question, be permitted to reverse his theory in the State Court in a suit to revive the money decree. None of the three cases cited by petitioner is in point, since in none of them was

there an issue tendered in the pleadings that the claim was dischargeable in bankruptcy.

But whether the Appellate Court is correct or in error in stating this additional reason for reversal, we must conclude: that the portion of the opinion finding that the issue tendered by petitioner's allegation in his objections to discharge resulted in an adjudication of the dischargeability of his claim, is *a question primarily of pleading, and not of federal law;* is wholly unnecessary to a determination of the cause, and confers no jurisdiction on this Court. Said petition should, therefore, be denied.

V.

On pages 12-16 of his brief, petitioner has made allegations and charges too serious to be ignored, but which are not within the scope of his petition, are not supported by anything in the record, and the same should be disregarded by this Court.

(a) Petitioner has challenged the regularity of the bankruptcy proceedings and this respondent's conduct therein (pp. 12, 13, 14, petitioner's brief).

Neither the schedules referred to on pages 12 and 13, nor the testimony of witnesses before the referee, nor the stipulation referred to, are in evidence, nor does respondent now, after sixteen years, have access to these documents. This respondent can only say that the matters relating to his bankruptcy were heard by Referee Wean, and, on objection, by Judge Carpenter. Various motions and petitions were thereafter heard by Referee Parkin, and Judge Wilkerson, who reviewed the history of the case (R. 19-21), and concluded his memorandum opinion holding that "the motion of the objecting creditor Strobl to vacate the order

of discharge heretofore entered in this cause and to reopen the cause, therefore, must be denied."

It is submitted that the matters charged, if they existed, could not have escaped the attention of two referees and two judges who had the matter of respondent's discharge under consideration in one form or another from 1924 to 1937.

(b) Petitioner again goes outside the record to charge that this respondent has been guilty of bribing respondent's attorneys (pp. 14-16, petitioner's brief).

This respondent earnestly protests his innocence of this most serious charge, and calls this Court's attention to the fact that most of the alleged conversations cited by petitioner as evidence are said to have occurred in court before presiding judges. If petitioner were convinced that such corrupt methods had been employed by this respondent, it can hardly be supposed that Referees Wean and Parkin, Federal Judges Carpenter and Wilkerson, and State Court Judge Williams, in the period from 1924 to 1939, would have failed to detect, or would not have become informed of such corruption. If the charges were true one or more of these officials would most certainly have seen that punitive proceedings were instituted against this respondent.

But under the numerous authorities listed under Point V (p. 7 this brief), this Court cannot be called upon to consider matters not included in the petition. Since the above matters referred to on pages 12-16 of petitioner's brief are omitted from the petition as well as the record, it is earnestly submitted that they should be entirely disregarded.

CONCLUSION.

The case was properly decided by the Appellate Court. There is no conflict of opinion on the federal question on which it was decided. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

JOHN ZIDEK, JR.,
Respondent pro se.